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NORTHERN DISTRICT OF CALIFORNIA

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10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION

13 CV 12 80 164 MISC  
14 Misc. Action No.

15 In re Application of Abbott Laboratories for  
16 Order to Obtain Discovery for Use in a Foreign  
17 Proceeding

18 ABBOTT'S ADMINISTRATIVE  
19 MOTION TO FILE UNDER SEAL  
20 CERTAIN DOCUMENTS  
21 SUPPORTING ABBOTT'S EX PARTE  
22 APPLICATION FOR ORDER UNDER  
23 28 U.S.C. § 1782(A) PERMITTING  
24 SUBPOENAS;

25 DECLARATION OF ROBERT F.  
26 MCCUALEY;

27 ~~[PROPOSED]~~ ORDER

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1 Pursuant to Civil Local Rule 79-5, Abbott Laboratories (“Abbott”) respectfully moves to file  
2 under seal Abbott’s *Ex Parte* Application for Order Under 28 U.S.C. § 1782(a) Permitting  
3 Subpoenas, the Memorandum in Support of Abbott’s *Ex Parte* Application, and the supporting  
4 Declaration of Robert F. McCauley and Exhibits A-C and E thereto.

5 First, Abbott’s *Ex Parte* Application for Order Under 28 U.S.C. § 1782(a) does not foreclose  
6 any person or entity involved from contesting the Rule 45 subpoenas once issued and, thus, this  
7 application is not “dispositive.” Because this is not a dispositive motion, Abbott need only show  
8 “good cause”—not a “compelling reason”—for the designated materials to remain under seal. *See,*  
9 *e.g., Kamakana v. Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006) (“[a] ‘good cause’ showing under  
10 Rule 26(c) will suffice to keep sealed records attached to nondispositive motions”); *Rich v. Hewlett-*  
11 *Packard Co.*, 2009 WL 2168688, at \*1 (N.D. Cal. Jul 20, 2009) (“The motion is [ ] not ‘dispositive’  
12 in the relevant sense, and a showing of good cause is sufficient to justify filing these documents  
13 under seal.”).

14 Second, the information which Abbott seeks to protect is commercial information under Fed.  
15 R. Civ. P. 26(c)(1)(G) related to a confidential foreign proceeding. In this particular instance, the  
16 rules of the foreign tribunal require Abbott to keep certain information, including the existence of the  
17 specific foreign proceeding, strictly confidential. (*See* Ex. E. to McCauley Declaration.)  
18 Accordingly, any information that could permit the public to ascertain (1) the identity of the party  
19 against whom Abbott is seeking the foreign proceeding, (2) the identity of the specific tribunal, or  
20 (3) the subject matter of the dispute, which has been noticed for the foreign proceeding, could  
21 potentially lead to litigation over the confidentiality issue.<sup>1</sup> Accordingly, good cause exists under  
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26 <sup>1</sup> Abbott does not admit any that any particular disclosure would constitute a violation of the rules of  
27 any foreign tribunal. However, Abbott seeks to avoid any public disclosure that could lead to a  
28 dispute with its counterparty over confidentiality. As evidenced by this motion, Abbott has made  
every reasonable effort to comply with the confidentiality rules of the tribunal before which it seeks  
relief.

1 Fed. R. Civ. P. 26(c)(1)(G) for the designated materials, addressed individually, and in detail below,  
 2 to remain under seal.<sup>2</sup>

3 Because **Abbott's Ex Parte Application, the Memorandum in Support of Abbott's Ex**  
 4 **Parte Application, and the supporting McCauley Declaration and Exhibit C thereto** identify a  
 5 party against whom Abbott is invoking the foreign proceeding (and predecessor entities) and the  
 6 specific nature of the parties' dispute, Abbott respectfully requests to file said papers under seal. In  
 7 this instance, the public revelation of the name(s) of said party and predecessor entities, as well as  
 8 patent and application numbers and the names of declarants/participants of said party and  
 9 predecessor entities, could reveal the identity of the party adverse to Abbott, as well as the patent  
 10 and subject matter that are the subject matter of the foreign proceeding.

11 In addition, because **Abbott's Ex Parte Application, the Memorandum in Support of**  
 12 **Abbott's Ex Parte Application, and the supporting McCauley Declaration and Exhibits A-C**  
 13 provide details of the technology and invention dates at issue in the foreign proceeding, they are  
 14 being submitted for filing under seal. Specifically, from the technical details, subject matter, and  
 15 dates, the general public could determine not only the patent-at-issue, but also the owner of that  
 16 patent and the subject matter of the dispute. For example, using the technology terms and date  
 17 ranges Abbott proposes to redact, a simple keyword search on the "Google Patents" or the PTO  
 18 website yield lists of results that include the patent-at-issue. If the search is conducted in particular  
 19 ways, that patent-at-issue is the first hit on the search. Accordingly, a person with even minimal  
 20 knowledge of the subject industry could determine which patent is at-issue, the owner of the patent  
 21 against whom Abbott is arbitrating the dispute, and the nature of the dispute.

22 **Abbott's Ex Parte Application, the Memorandum in Support of Abbott's Ex Parte**  
 23 **Application, and the supporting McCauley Declaration and Exhibit C** also identify and describe  
 24 the existence, terms, and conditions of a confidential contract relating to a U.S. Patent. The

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27           <sup>2</sup> Abbott is also under a separate contractual obligation to keep confidential the existence of a certain  
 28 business relationship addressed in its papers, which is an independent basis to seal portions of  
 Abbott's filings.

1 existence, terms and conditions of the contract are subject to a confidentiality restriction, and the  
2 terms and conditions of the contract are proprietary and a trade secret to Abbott, the public  
3 disclosure of which would cause Abbott competitive harm. Furthermore, public revelation of the  
4 nature and terms of the contract could reveal the identity of the party against whom Abbott is  
5 invoking the foreign proceeding, as well as the patent and subject matter of the dispute, which are  
6 themselves confidential under the terms of the contract.

7       Lastly, **McCauley Declaration Exhibit E** identifies the foreign tribunal under which  
8 Abbott's claim will be adjudicated, and the existence of the specific foreign proceeding is to be kept  
9 confidential under the body's rules.

10      **Documents Submitted for Partial Filing Under Seal:** Pursuant to Civil Local Rule 79-5,  
11 Abbott is lodging with the Clerk highlighted chambers copies of the documents that Abbott is  
12 submitting for partial filing under seal (specifically, **Abbott's Application, the Memorandum in**  
13 **Support of Abbott's Ex Parte Application, the supporting McCauley Declaration and Exhibits**  
14 **A and B**), in which the confidential information explained above is highlighted in yellow. Upon the  
15 direction of the Clerk, Abbott will also publicly file redacted copies of said documents.

16      **McCauley Declaration Exhibits C and E Submitted for Filing Under Seal in their**  
17 **Entirety:** In addition, Abbott is submitting **Exhibits C and E to the McCauley Declaration** for  
18 filing under seal in their entireties. As explained above, Exhibit C is submitted for filing entirely  
19 under seal because it discloses the patent-at-issue, the owner of the patent, details of a confidential  
20 contract, and technical information that could be used to identify the patent-at-issue and the subject  
21 matter of the dispute. Exhibit E is submitted for filing entirely under seal because it discloses the  
22 name and rules of the foreign tribunal that is the subject of strict confidentiality provisions, including  
23 even the very *existence* of the specific foreign tribunal itself.

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## **DECLARATION OF ROBERT F. McCUALEY**

I, ROBERT F. McCUALEY, declare as follows:

1 I am an attorney licensed to practice before all Courts of the State of California and  
2 am admitted in this District. I am a partner of Finnegan, Henderson, Farabow, Garrett & Dunner  
3 LLP, counsel for Abbott in the above-entitled action. The matters stated herein are based upon my  
4 personal knowledge, and if called as a witness, I would testify as to them.

7       2. The factual representations made above in this Administrative Motion are true and  
8 correct to the best of my knowledge and belief.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and this declaration was executed this 9th day of July, 2012, at Palo Alto, CA.

/s/ Robert F. McCauley  
Robert F. McCauley

~~[PROPOSED] ORDER~~

**IT IS HEREBY ORDERED** that Abbott's Administrative Motion to file under seal is GRANTED. The Clerk of the Court is ORDERED to file under seal the following documents:

1. Abbott's *Ex Parte* Application for Order Under 28 U.S.C. § 1782(a) Permitting Subpoenas;

2. The Memorandum of Law in Support of Abbott's *Ex Parte* Application; and
3. The supporting Declaration of Robert F. McCauley, as well as Exhibits A-C and E to the McCauley Declaration.

In addition, Abbott's outside counsel at Finnegan, Henderson, Farabow, Garrett & Dunner L.L.P. are authorized to sign and serve the subpoenas attached as Exhibits A and B to the McCauley Declaration.

## **IT IS SO ORDERED.**

Dated: July 25, 2012

